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CITY OF BOERNE, TEXAS,

Petitioner,

v.

P.F. FLORES, ARCHBISHOP OF SAN ANTONIO,

Respondent,

and

UNITED STATES OF AMERICA,

Respondent-Intervenor.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC. IN SUPPORT OF RESPONDENTS

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*Consent to the filing of this brief has been granted by counsel for all parties via a stipulation previously lodged with the Clerk and a letter of consent from the United States filed simultaneously herewith.

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Interest of *Amicus Curiae*

The NAACP Legal Defense and Educational Fund, Inc. (LDF) was incorporated in 1939, for the purpose, *inter alia*, of rendering legal aid, free of charge, to indigent "Negroes suffering injustices by reason of race or color." LDF has appeared in numerous cases before this Court. *See NAACP v. Button*, 371 U.S. 415, 422 (1963) (describing LDF as a firm with a "corporate reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation").

The lessons drawn by LDF and other civil rights litigators who have confronted discrimination on a case-by-case basis -- *e.g.*, (1) that there are myriad and ingenious ways in which prejudice may be cloaked in neutral garb, *see, e.g., Lane v. Wilson*, 307 U.S. 268, 275 (1939); (2) that requiring proof of discriminatory motive makes such litigation both difficult and divisive, *see, e.g., Mobile v. Bolden*, 446 U.S. 55, 134-35 (1980) (Marshall, J., dissenting); and (3) that facially "neutral" practices often yield harms indistinguishable from those resulting from intentional discrimination, *see, e.g., Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) -- have long informed Congress' judgment about what civil rights legislation is "appropriate," often supporting enactment of statutes that forbid unjustified unequal treatment, without requiring proof of invidious motive (*see, e.g.*, 1991 Civil Rights Act, Pub. L. 102-166; Voting Rights Act, 42 U.S.C. § 1973). The Legal Defense Fund -- and the Nation -- have a strong interest in affirmation of the validity of such laws and of Congress' power under the Reconstruction Amendments to act decisively to protect Americans' rights.

LDF's experience is relevant to this case in one further respect: LDF attorneys served as counsel in *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), the decision reaffirming this Court's authority as primary expositor of the Constitution, and LDF participated as *amicus curiae* in *Bob Jones Univ. v. United States*, 461 U.S. 574 (1983), which held the

government's "fundamental, overriding interest in eradicating race discrimination in education," *id.* at 602, to outweigh an asserted religious right to discriminate. While critics of the statute now before the Court have claimed those precedents to be implicated here, LDF is convinced that the Religious Freedom Restoration Act may and should be upheld without compromising the principles for which those cases stand.

Summary of Argument

The Religious Freedom Restoration Act (RFRA) is an "appropriate" exercise of Congress' authority to "enforce . . . the provisions" of the Fourteenth Amendment. This Court has long read Section 5 to endow Congress with power to enact any measure "carry[ing] out the objects" of the Reconstruction Amendments, so long as it "tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights." *Ex Parte Virginia*, 100 U.S. 339, 345-46 (1880). RFRA easily passes that test. It creates a real safeguard for the right of religious Free Exercise secured against the States by the Due Process Clause, *see Employment Div. v. Smith*, 494 U.S. 872 (1990), and it supplies needed protection against unequal treatment of minority groups whose practices are unpopular or misunderstood.

To cloud its validity, RFRA's opponents have proposed various doctrinal means -- including overruling *Katzenbach v. Morgan*, 384 U.S. 641 (1966) -- whereby the Court might rein in congressional power. These drastic revisions have no warrant in the text, structure, or original meaning of the Reconstruction Amendments; and far from supplying the "special justification" that must accompany departure from precedent, developments since *Morgan* only weigh in its favor. *Morgan* and like decisions have enabled Congress to play a central role in protecting basic civil rights, allowing federal courts to adhere to a restrained role. That salutary arrangement is consistent with the letter and spirit of the Constitution. It ought not lightly be scuttled.

ARGUMENT

RFRA is "Appropriate" Legislation Enforcing the Fourteenth Amendment

A. RFRA is Plainly Within Congress' Enforcement Authority

For more than a century, this Court's cases have emphasized the breadth of the authority conferred upon Congress to "enforce by appropriate legislation" the guarantees of the Reconstruction Amendments. *See Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440 (1968). Specifically, the standard for testing the validity of an exercise of an "enforcement" power has been held to be no different from that used to decide whether a law is "necessary and proper," *see* Art. I, § 8, cl. 18, to the execution of one of Congress's other enumerated powers:

> Whatever legislation is appropriate, that is, adapted to carry out the objects the [Civil War] amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Ex parte Virginia, 100 U.S. 339, 345-46 (1880) (quoted in *South Carolina v. Katzenbach*, 383 U.S. 301, 327(1966)); *accord City of Rome v. United States*, 446 U.S. 156, 174 (1980) ("Congress's authority under § 2 of the Fifteenth Amendment, [is] no less broad than its authority under the Necessary and Proper Clause"); *see also Katzenbach v. Morgan*, 384 U.S. 641, 653 (1966) (Court need only to "perceive a basis" for exercise of enforcement power).[1]

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[1] *Compare McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly

These principles are fully consistent with the text, history, and purposes of the Reconstruction Amendments, *see infra*, and they are entirely sufficient to sustain RFRA.

RFRA's detractors have argued that the Act's "ends" are not "legitimate," suggesting that the Act is not truly "remedial," either because it reaches conduct, *i.e.* that authorized by certain "neutral laws of general application," whose constitutional validity under *Employment Div. v. Smith*, 494 U.S. 872 (1990), is plain; or, more plausibly, that it is not "plainly adapted" to those ends, because the degree of such "overbreadth" is unacceptably high.

As for the first, any suggestion that a law loses its "remedial" character when it sweeps in conduct that is not in itself prohibited by the Constitution has been rejected even by Justices dissenting in enforcement power cases, *see, e.g.*, *City of Rome*, 446 U.S. at 209 (Rehnquist, J., dissenting) ("It has never been seriously maintained . . . that Congress can do no more than the judiciary to enforce the Amendments' commands"), and similar arguments have been firmly rejected in related settings, *see, e.g.*, *United States v. United States Gypsum Co.*, 340 U.S. 76, 88-89 (1950) (antitrust remedy may prohibit conduct that is "entirely proper when viewed alone").

Even the less extreme indictments of RFRA's breadth are defective, for they: (1) severely overstate the extent to which the statute reaches beyond the area of constitutional protection and also the consequences of falling within the Act's reach; (2) slight Congress' substantial expertise in designing civil rights remedies; and (3) overlook altogether the ways in which RFRA's breadth affirmatively advances important objectives related to "the enjoyment of perfect equality of civil rights," *Ex Parte Virginia*, 100 U.S. at 346.

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adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional").

1. Congress Could Reasonably have Determined that RFRA was Needed to Safeguard the *Constitutional* Guarantee of Religious Free Exercise

Suspicion about RFRA's *bona fides* as enforcement of the *Smith* Free Exercise right appears to rest on one or more of the following suppositions: (1) that the gap between the constitutional right and the statutory guarantee is large; (2) that "real" violations of the Constitutional guarantee (*i.e.*, laws "targeting" religious practices) are infrequent and easily detected; and/or (3) that the consequences of coverage are grave. None of these is fully correct.

First, although the majority opinions in *Smith* and *Church of the Lukumi Babalu v. City of Hialeah*, 508 U.S. 520 (1993), place laws "targeting" religion at the center of the Free Exercise Clause's concern, it bears emphasis that *Smith* recognized two other situations in which heightened scrutiny is warranted as a matter of constitutional law: when "hybrid" rights are burdened, 494 U.S. at 882, and when the challenged action involved "individualized" consideration, *id.* at 884. Indeed, *Smith* gives no indication that these categories are to be conceived narrowly, *see id.* at 882 (noting that it is "easy to envision" a "hybrid" claim rooted in the right to Free Association -- even though the Court apparently has never decided a case explicitly on mixed, religion and association, grounds); *see also Bowen v. Roy*, 476 U.S. 693, 708 (1986) (Burger, C.J., concurring) (in an individualized determination case, "refusal to extend an exemption to an instance of religious hardship suggests a discriminatory intent"). Any determination of RFRA's "overbreadth" would need to take into account the full range of situations to which, consistent with *Smith*, heightened constitutional scrutiny is still applicable.[2]

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[2] Indeed, the facts of this case, involving denial of a congregation's (associational) right to worship together and the extinction of an owner's right to develop property as he sees fit, might well qualify for heightened constitutional scrutiny as a "hybrid." There might also be

Similarly, no "overbreadth" judgment could rest on the (supposed) paucity of recent instances of deliberate targeting: assuming for argument's sake that the number of such cases is modest, infrequency could as well be an indication of the efficacy of the deterrents (*i.e.*, the *Sherbert* test and, later, RFRA) as of the rarity of the offense.

Also plainly relevant to the reasonableness of Congress's judgment are the consequences of any statutory overbreadth. While *Oregon v. Mitchell*, 400 U.S. 112 (1970), and *Katzenbach v. Morgan*, 384 U.S. 641 (1966), involved federal statutes that operated to void certain State laws that, by hypothesis, would have been upheld judicially, RFRA is not so rigid. Rather, RFRA gives governmental defendants an opportunity to defend their laws under a standard that produces substantial convergence, if not complete overlap with the Constitution's requirement.[3]

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issues as to whether the law creating the landmark district is sufficiently "general" to qualify for *Smith*'s safe harbor or whether the process by which building permits are granted and denied may be treated as an "individualized exemption" regime. Significantly, these latter sorts of issues are highly fact-intensive, and their full litigation requires substantial resources. A lone individual might have far more difficulty bringing such a case -- or persuading an attorney to do so -- than might a well-established church.

[3]*See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (O'Connor, J.) ("purpose" of strict scrutiny is to "smoke out" illegitimate motives); *EEOC v. Wyoming*, 460 U.S. 226, 239 (1983) (ADEA "requires the State to achieve its goals in a more individualized and careful manner than would otherwise be the case, but it does not require the State to abandon those goals, or to abandon the public policy decisions underlying them"); *cf. South Carolina v. Katzenbach*, 383 U.S. at 331 (noting that Voting Rights Act provided for "the possibility of overbreadth").

While some practices may fall under RFRA that would have survived under the *Smith* regime, that would likely be a consequence of the Act's shift in the burden of persuasion (and the risk of nonpersuasion) from plaintiffs to defendants. While Petitioner

In the end, acknowledging the significance of factors such as likelihood of detection, litigation costs, and likelihood and cost of error underscores the point that ensuring enforcement of the Free Exercise guarantee involves characteristic elements of legislative competence and expertise. Not only is Congress best equipped to register and balance the relative dangers of over- and under-deterrence, but it does so informed by long experience drafting and overseeing statutes securing civil rights and civil liberties.[4]

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suggests that with such a shift in burden, Congress has "turn[ed] day to night," Br. at 20, this Court's cases counsel a more restrained view, *see City of Rome*, 446 U.S. at 214 (Rehnquist, J., dissenting) (in light of "difficulties of proving [intent] . . . Congress could properly conclude that as a remedial matter it was necessary to place the burden of proo[f]" on government defendants); *Plaut v. Spendthrift Farm, Inc.*, 115 S. Ct. 1447, 1457 (1995) ("Congress can eliminate . . . a particular element of a cause of action that plaintiffs have found it difficult to establish").

Moreover, even laws incorporating a rule that outlaws discriminatory effects (without regard to a jurisdiction's motives), are not inappropriate remedial measures. Such laws typically implicate a second -- and fully legitimate -- sort of remedial power: the authority to address the persisting effects of *past* discrimination; *see, e.g., Gaston County v. United States*, 395 U.S. 285, 296 (1969) ("impartial" literacy test "fair[ly]" administered, may be suspended, so as to deny effect to past discrimination in education); *see also The Civil Rights Cases*, 109 U.S. 3, 11 (1883) (noting Congress's unquestioned authority to "enact appropriate legislation correcting the effects of . . . prohibited state laws"). That strand of the legislature's remedial power is not implicated in this case.

[4]*See Fullilove v. Klutznick*, 448 U.S. 448, 502-03 (1980) (Powell, J., concurring) ("Congress has no responsibility to confine its vision to the facts and evidence adduced by particular parties. Instead, its special attribute as a legislative body lies in its broader mission to investigate and consider all facts and opinions that may be relevant to the resolution of an issue. One appropriate source is the information and expertise that Congress acquires in the consideration

Seen in this light, the "appropriateness" of RFRA's main innovation -- providing a cause of action that depends on (relatively easy to detect) burdens on practice, rather than on the (more elusive) "generality" *vel non* of the law imposing the burden -- should not be second-guessed. *Cf. McCulloch v. Maryland*, 17 U.S. (4 Wheat.) at 423 ("where the law is not prohibited, and is really calculated to effect any of the objects entrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department").

2. RFRA Also Effectuates Core Concepts of Equal Protection

a. RFRA Provides Protection for Minorities

As much as the Act was meant to supply a fully effective safeguard for the constitutional immunity from laws "prohibiting the free exercise of religion," RFRA's text, structure, and legislative history disclose a distinct, complementary statutory purpose: to assure *equal* treatment for "*all*," *see* 42 U.S.C. § 2000bb(b), equally weighty religious claims. When this aim is taken into account, RFRA's breadth ceases altogether to be ground for constitutional suspicion and instead weighs powerfully in its favor, as reflecting the wholly legitimate concern (explicitly acknowledged in *Smith*, amply recorded in history and familiar, no doubt, from congressional experience) that a system in which accommodations of religious practice must be obtained, one at a time, through the political process poses a deep threat to unpopular, uncommon, or poorly understood religious faiths -- and to principles of equality, in general. *Cf. Larson v. Valente*, 456 U.S. 228, 245-46 (1982) ("'There is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally.'") (citing *Railway*

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and enactment of earlier legislation").

Express Agency, Inc. v. New York, 336 U.S. 106, 112 (1949) (Jackson, J., concurring)).

If the testimony heard by Congress before RFRA's enactment made one point above all others, it was that the consequences of the *Smith* rule -- *i.e.*, a regime in which any protection for religious exercise beyond the modest constitutional minimum was a matter of legislative grace -- would bear unequally on adherents of "minority" religions, typically "discrete and insular" groups whose ability to influence the political process is negligible and whose ways are most likely misunderstood by the societal mainstream.[5]

But even if Congress had held no such extensive hearings, the threat of unequal treatment is patent enough to be the subject of judicial notice, *see, e.g.*, *Goldman v. Weinberger*, 473 U.S. 503, 512 (1986) (Stevens, J. concurring) (stressing "interest in uniform treatment for the members of all religious faiths" and noting danger that, an Orthodox Jew's claim to wear a yarmulke might be accommodated, while "a similar claim on behalf of a Sikh or a Rastafarian

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[5]*See, e.g., Religious Freedom Restoration Act, Hearings Before the Senate Committee on the Judiciary*, 102nd Cong., 2d Sess. 5-7 (1992) (testimony recounting officials' refusal to respect objection, grounded in Hmong religion, to performance of autopsy). In many cases, although not always, these groups are racial and ethnic minorities who face additional prejudice and misunderstanding on those grounds. *See, e.g., Clay a/k/a Ali v. United States*, 403 U.S. 698 (1971) (Black Muslim); *Yang v. Sturner*, 780 F. Supp. 558 (D.R.I. 1990) (Hmong); *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991) (African American Jehovah's Witness); OSHA Notice CPL 2 (Nov. 5, 1990) (revoking exemption from hard hat rule for Sikhs); *Campos v. Coughlin*, 854 F. Supp. 194 (S.D.N.Y. 1994) (Santeria); *Toledo v. Nobel-Sysco, Inc.*, 892 F.2d 1481 (10th Cir. 1989) (Native Americans); *Robinson v. Foti*, 527 F. Supp. 1111, 1113 (E.D. La. 1981) (Rastafarian). *See generally* Bonnie I. Robin-Vergeer, *Disposing of the Red Herrings: A Defense of the Religious Freedom Restoration Act*, 69 S. CAL. L. REV. 589, 749 & n.659 (1996) (gathering congressional testimony).

might readily be dismissed"), or, as *Smith* put it: "It may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in." 494 U.S. at 890. Indeed, those legislators who voted on RFRA no doubt had an additional frame of reference: their own experience in trying, in piecemeal fashion, to provide protection for religious practices. *See* House Hearings at 123 (Rep. Solarz) ("we as experienced legislators should realize" that without RFRA "religion will be subject to the standard interest group politics that affect our many decisions. It will be the stuff of postcard campaigns, 30-second spots, scientific polling, and legislative horse trading"). *See Edwards v. Aguillard*, 482 U.S. 578, 637 (1987) (Scalia, J., dissenting). *See also Board of Educ. of Kiryas Joel v. Grumet*, 114 S. Ct. 2481, 2498 (1994) (O'Connor, J., concurring) ("A group petitioning for a law may never get a definite response, or may get a "no" based not on the merits, but on the press of other business or the lack of an influential sponsor").[6]

Nor are considerations of equal treatment matters for casual concern: a regime in which individuals with essentially similar religious claims receive different treatment from government would be a constitutional violation, *see generally*

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[6]Although true "uniformity" is likely an unattainable ideal even in the courts, *see Goldman* at 512 (Stevens, J., concurring) (stressing difficulty of articulating a robust standard); *but cf. Adarand v. Peña*, 115 S. Ct. 2097, 2113 (1995) ("strict [judicial] scrutiny does take 'relevant differences' into account"), the Congress that enacted RFRA was surely justified in concluding that the judicial branch was a more promising forum from which to seek principled, consistent decisions than the legislature. *See also Kiryas Joel*, 114 S. Ct. at 2491 (noting that legislature's failure to act is generally not reviewable).

Kiryas Joel, 114 S. Ct. at 2497 (O'Connor, J., concurring),[7] which a conscientious member of Congress would have the unquestioned power and responsibility to correct under section 5 of the Fourteenth Amendment. *See generally Larson*, 456 U.S. at 245 ("Free exercise . . . can be guaranteed only when legislators -- and voters -- are required to accord to their own religions the very same treatment given to small, new, or unpopular denominations").

Although it remains possible for State governments to avoid such Equal Protection problems themselves, *see, e.g.*, R. I. Gen. Law § 42-80.1-3 (1993), and theoretically possible for courts to adjudicate claims of denial of equal treatment on a case-by-case basis, *see, e.g., Olsen v. DEA*, 878 F.2d 1458 (D.C. Cir. 1989) (Ginsburg, J.), Congress was fully justified in believing that equality would be inadequately protected at the local level, *see Croson*, 488 U.S. at 523 (Scalia, J., concurring) ("[D]iscrimination against any group finds a more ready expression at the state and local than at the federal level"), and that norms of equal treatment would go underenforced if left to judicial Equal Protection analysis, *see Olsen*, 878 F.2d at 1470-71 (Buckley, J., dissenting).

As to the latter, imposing obstacles would stand in the way of any individual challenging legislative *failure* to provide a religious accommodation on Equal Protection grounds, *see Kiryas Joel*, and a successful challenge to the grant of an exemption to another religious claimant presumably would require persuasive proof: (1) that the two claims were comparably sincere; (2) that the burdens on religious practice were similarly substantial; and (3) that the

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[7] "[T]he Religion Clauses, the Free Exercise Clause, the Establishment Clause, the Religious Test Clause . . . and the Equal Protection Clause . . . all speak with one voice on this point: absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."

government policies were similarly amenable to modification. *Cf. United States v. Armstrong*, 116 S. Ct. 1480 (1996) (discussing required Equal Protection showing). And even where a religious claimant could discharge that burden, of course, she would run the risk that the relief ordered would be to strike down the existing accommodation, rather than enlarge the beneficiary class, *see Olsen*, 878 F.2d at 1464; *Califano v. Jobst*, 434 U.S. 47, 56 n.14 (1977); *see generally* Ruth Bader Ginsburg, *Some Thoughts on Judicial Authority to Repair Unconstitutional Legislation*, 28 CLEV. ST. L. REV. 301 (1979) -- a result almost certain to foster acrimony among adherents of different religions and deepen hostility to already unpopular religious groups. Under the circumstances, Congress could easily have determined that even the most meritorious claims to equal treatment would go unenforced, and that a uniform, national standard was the necessary and appropriate answer.

b. RFRA Further Assures Equal Protection of Fundamental Rights and Promotes Impartial Governance

RFRA has additional Equal Protection dimensions as well. In enacting the statute, Congress codified its determination that "laws 'neutral' toward religion may burden religion as surely as laws intended to interfere with religious exercise," 42 U.S.C. § 2000bb(a)(2). This finding, the product of Congress's unquestioned fact-finding competence, is in no way subversive of *Smith* -- which held that the constitutional bar on "law[s] . . . prohibiting free exercise" supplies authority for invalidating only the second kind of law, but did not purport to decide that the *effects* of both sorts of law are fundamentally different (*i.e.*, that the burdens of a neutral law are easier to bear). And RFRA reflects a further, equally reasonable, congressional judgment: that even if it is permissible to draw some distinction between individuals harmed by "neutral" action and those burdened by "non-neutral" laws, equality principles

impose a limit on inequalities of legal entitlement that may permissibly be grounded on that distinction.

There are three ways in which that determination might be understood to "elaborate upon the direct [Equal Protection] command of the Constitution," *Oregon v. Mitchell*, 400 U.S. at 296 (Stewart, J.). First, Congress could have decided that laws based on indifference or insensitivity to, or misunderstanding of, religion, although perhaps not unconstitutional in themselves, come close enough to the antagonistic laws banned by the First Amendment of its own force to warrant prohibition. *Cf. Lukumi*, 508 U.S. at 524 (noting that defendant "officials . . . did not understand, failed to perceive, or chose to ignore" their obligation not to target religious practice).

Or Congress might have determined that religious practice is so intertwined with belief that the governmental duty of impartiality properly extends to the latter, along with the former, *see, e.g.*, 42 U.S.C. § 2000e(j) (duty of employment nondiscrimination on account of religion includes obligation "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice").

Finally, without questioning whether the distinction drawn in *Smith*, between individuals burdened by non-neutral laws and those who shoulder the "incidental" burdens imposed by neutral ones, is necessary or sensible *as a matter of First Amendment interpretation*, Congress was permitted to conclude, *as a matter of Equal Protection*, not to allow vast inequalities of legal right to rest on that distinction. *Cf. Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 880-82 (1985) (State law that does not violate the Commerce Clause may be struck down as "discriminatory" under the Equal Protection Clause); *Hunter v. Underwood*, 471 U.S. 222, 233 (1985) (the fact that felon disenfranchisement is not closely scrutinized under the "fundamental rights" prong of Equal Protection, *see Richardson v. Ramirez*, 418 U.S. 24 (1974), does not insulate it from invalidation for having a

discriminatory purpose). *See also Morgan*, 384 U.S. at 654 n.15 (noting that Court's "cases have held that the States can be required to tailor carefully the means of satisfying a legitimate state interest when fundamental liberties and rights are threatened, and Congress is free to apply the same principle in the exercise of its powers") (citations omitted).

The same principle applies to other legislation whereby Congress has undertaken (through exercise of Article I and Section 5 powers), to impose a standard of equal treatment that the judiciary has not held the Constitution of its own force to require. *Compare, e.g.*, Americans with Disabilities Act, 42 U.S.C. § 12201 *et seq.*; Age Discrimination in Employment Act, 29 U.S.C. § 621 *et seq.*; Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) *with Cleburne* (classifications based on mental retardation do not warrant heightened scrutiny); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307 (1976) (*per curiam*) (age); *Geduldig v. Aiello*, 417 U.S. 484 (1974) (pregnancy); *compare also Washington v. Davis*, 426 U.S. 229 (1976) (disparate impact alone does not violate Equal Protection) *with Connecticut v. Teal*, 457 U.S. 447 (1982) (applying Title VII disparate impact standard to State defendant).

Such laws express "the prevailing sense of justice in this country," *Patterson v. McLean Credit Union*, 491 U.S. 164, 174 (1989), and have become part of the "warp and woof of civil rights law," *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 696 (1978). As is explained *infra*, such legislation acknowledges that judicial enforcement of principles of equality often reflects the unavoidable limitations of: (a) the judiciary's status as a politically unaccountable branch; (b) its circumscribed competence to resolve broad questions of social policy; as well as (c) Congress' authority, conferred explicitly by the Fourteenth Amendment, to enact legislation enforcing the Equal Protection Clause. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 678-79 (1966) (Black, J., dissenting); *see also Missouri v. Jenkins*, 115 S. Ct. 2038, 2061 (1995) ("Unlike

Congress, which enjoys discretion in determining whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, federal courts have no comparable license") (internal citations omitted).

B. There is no Justification for Re-Writing the Law Governing Congress' Enforcement Power

If established principles of constitutional law do not supply the basis for invalidating RFRA, Petitioner seems to argue, it is those principles -- rather than its challenge -- that should give way. In that spirit, Petitioner and its *amici* have proposed several ways in which the Court might depart from its prior decisions, in order to strike down RFRA: the Court might rule that the Section 5 power exists only to enforce Equal Protection principles and not those rights the Court has held protected by the Due Process guarantee (or, at least, not all of them), or, they suggest, the broad formulation of congressional power set out in *Katzenbach v. Morgan* might be disavowed.

These invitations to abandon precedent must be rejected. First, it is far from apparent that even re-writing the law in the manner suggested would yield the result sought. Limiting congressional power to Equal Protection concerns, for example, would by no means sound the death knell for RFRA, *see supra* (discussing Equal Protection rationales for RFRA). Moreover, no "special justification," *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984), whatever has been identified for rolling back the Court's enforcement power case law, nor is any apparent. Finally, as is shown *infra*, there is no basis in constitutional text, structure, or original meaning for concluding that the case law is wrong.

1. Congress Has Authority to Enforce "Incorporated" Rights

Petitioner has suggested that this case might be distinguished from others in which Congress' power to enforce the guarantees of the Reconstruction Amendments have been upheld, because RFRA, unlike 42 U.S.C. § 1981, *see Runyon v. McCrary*, 427 U.S. 160 (1976), or 42 U.S.C.

§ 1973b, *see City of Rome*, was passed only to secure the right to free exercise of religion, a right that is secured by the Fourteenth Amendment only by its "incorporation" in the Due Process Clause, *see Cantwell v. Connecticut*, 310 U.S. 296 (1940), whereas those other statutes have involved the "core" power to address denials of Equal Protection. This suggestion suffers from two fatal defects: first, as has been shown above, RFRA plainly *was* enacted pursuant to Congress' power to enforce principles of Equal Protection, and second, a rule denying Congress the power to enforce "provisions" of the Fourteenth Amendment other than the Equal Protection Clause is not only incompatible with constitutional text and binding precedent but would make no sense in light of the history and purposes of the Fourteenth Amendment.

To be sure, it is a historical fact that the Fourteenth Amendment's framers were most concerned with securing the basic legal rights of African Americans -- and it is similarly undeniable that Congress' enforcement power is at its zenith when dealing with matters of racial discrimination, which are the concern of the Thirteenth and Fifteenth amendments, as well as the Fourteenth, *see Georgia v. Rachel*, 384 U.S. 780 (1966); *Carpenters v. Scott*, 463 U.S. 825, 835-37 (1983); *cf. Oregon v. Mitchell*, 400 U.S. at 128 (opinion of Black, J.) ("Where Congress attempts to remedy racial discrimination under its enforcement powers, its authority is enhanced by the avowed intention of the framers of the Thirteenth, Fourteenth, and Fifteenth Amendments"). It does not follow, however, that Congress's power to enact "appropriate" legislation enforcing the Fourteenth Amendment is limited to situations in which principles of racial equality are threatened, *cf. id.* at 143-44 (Douglas, J.). On the contrary, any such limitation on congressional power is inconsistent with the text of the Fourteenth Amendment and would have been highly alien to the understanding of those who framed and ratified it.

The terms of Section 5 offer no basis on which to ground a distinction between the Equal Protection guarantee and the other rights secured by the Fourteenth Amendment's first section. Instead, the text provides, with no limitation or qualification, for congressional power to enforce "the *provisions* of this Article," through "appropriate" legislation. And *Hutto v. Finney*, 437 U.S. 678 (1978), *Maher v. Gagne*, 448 U.S. 122 (1980), and *United States v. Price*, 383 U.S. 787, 789 (1966), confirm what plain meaning would suggest: that there is "no doubt of the power of Congress to enforce . . . every right guaranteed by the Due Process Clause of the Fourteenth Amendment" (internal citation omitted).[8]

Nor is there any substantial reason, as a matter of political principle, why Congress' discretion to vitiate the threat posed by local majorities to unpopular beliefs or practices would be more restricted than its power to protect against threats to unpopular groups. On the contrary, and as the Court's cases teach, efforts to distinguish between threats to liberty and to equality often prove unstable. *See, e.g., Loving v. Virginia* 388 U.S. 1 (1967) (striking down anti-miscegenation law as denying Due Process right to marry and Equal Protection); *cf. West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943) (invalidating compulsory flag salute law on Free Speech grounds); *Niemotko v. Maryland*, 340 U.S. 268, 273 (1951) (holding that "[t]he right to equal

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[8]In *Oregon v. Mitchell*, a majority of the Justices held that Congress' power to enforce the right to travel, the precise textual source for which is no more certain than for "incorporated" rights, *see Griffin v. Breckenridge*, 403 U.S. 88, 105-06 (1971), could supply the basis for supplanting State residency requirements for voting in federal elections (including those requirements which were not, in themselves, violative of the Fourteenth Amendment), *see* 400 U.S. at 147-50 (Douglas, J.); *id.* at 237 (Brennan, J, joined by White and Marshall, JJ.); *id.* at 285 (opinion of Stewart, J., joined by Burger, C.J., and Blackmun, J.). *See also Fitzpatrick v. Bitzer*, 427 U.S. 445 (1976) (gender discrimination).

protection of the laws, in the exercise of those freedoms of speech and religion protected by the First and Fourteenth Amendments" to have been denied by refusing park permit to Jehovah's Witnesses, out of "dislike for or disagreement with the Witnesses or their views"); *see generally* HARRY KALVEN, THE NEGRO AND THE FIRST AMENDMENT (1965).

This interconnection between the Equal Protection guarantee and the liberties secured by the other clauses of the first section of the Fourteenth Amendment is by no means a modern discovery. Historical scholarship and the debates of the Reconstruction Congresses themselves show the Nineteenth Century Republicans responsible for drafting and securing the Amendment's ratification to have been acutely aware of the relationship between racial injustice and denials of civil liberties. *See, e.g.*, MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE (1986); DAVID A. RICHARDS, CONSCIENCE AND THE CONSTITUTION (1993). It had been out of solicitude for slavery, the Amendment's supporters repeatedly asserted, that the Framers of the Constitution had failed to make the Bill of Rights applicable to the States, *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1090 (1866) (Rep. Bingham). Repeatedly, in the debates over the Amendment and other civil rights legislation, Republicans asserted that the compulsion to protect slavery from all incursions had led Southern States to interfere with rights of free speech, freedom of the press, and association, to permit mob justice, and to inflict cruel and unusual punishment. *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (Sen. Trumbull). And these injustices were not believed to be a thing of the past: accounts of assaults on the basic rights of blacks and Republican sympathizers at the hands of unreconstructed rebels were being regularly received. *See* Robert J. Kaczorowski, *Revolutionary Constitutionalism*, 61 N.Y.U. L. REV. 863, 875 n.44 (1986). Whatever the precise intentions of the 39th Congress with regard to incorporating the guarantees of the original Bill of Rights against the States through the Fourteenth

Amendment, their dismay over these infringements of civil liberties by the States was undeniable.[9]

Indeed, the connection, as a matter of history, between concern for black freedom and for religious free exercise may have been closest of all.[10] Religion had

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[9]Although Petitioner does not suggest that the Court overrule *Cantwell* or the many other decisions applying the Bill of Rights to the States, the argument that the Section 5 power does not comprehend such rights has as its tacit premise a view of incorporated rights as a "poor relation" to more textually explicit Fourteenth Amendment guarantees. To the extent that it is relevant, recent historical scholarship has substantially fortified the position that the Framers *did* intend the Fourteenth Amendment to secure the Bill of Rights against the States. *See generally* CURTIS; *see also* Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L. J. 1193, 1235 (1992).

[10]It has been argued, *see Amicus* Clarendon Foundation Br. at 25-26, that even if Congress has broad power to enforce incorporated rights, the "plain language" of the First Amendment somehow makes the Free Exercise right uniquely inappropriate for congressional action. To the extent that this argument stresses the phrase "Congress shall make no law," it is really an argument against *incorporation* of each of the clauses of the First Amendment, including the Free Speech Clause -- a position toward which the Court has shown no inclination of heading, *see, e.g.*, *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994) (applying "First Amendment" standards to injunction issued by state judge).

To the extent that this argument depends on the original intent of the Framers of the First Amendment, it "gets the wrong history right," Kurt T. Lash, *The Second Adoption of the Free Exercise Clause: Religious Exemptions Under the Fourteenth Amendment*, 88 NW. U.L. REV. 1106, 1196 (1994). *See 44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1515 (Scalia, J., concurring) (relevant inquiry is understanding of Framers of the *Fourteenth* Amendment).

Nor is the "textual" argument overly careful about the constitutional text: although the First Amendment forbids Congress from enacting a law "respecting" the Establishment of Religion, implying a complete legislative disability on the subject, it denies Congress the

played a crucial role in the history of slavery as a political and constitutional issue. Many of the original Abolitionists had come to oppose slavery on religious grounds, and their antagonists in the Southern elite classes believed religiously motivated revolt to be the greatest threat to the institution of slavery, *see e.g.*, Lash, *Free Exercise* at 1133-34 (noting that Nat Turner, leader of the bloody 1831 uprising, had been a minister). This perception led to widespread adoption of repressive measures, including laws banning slaves' congregating together or learning to read, meant to prevent them from discerning from the Bible any hope of worldly liberation; and ultimately, to even more extreme measures, aimed at stopping the (Northern-influenced) religious word from spreading. *See id.* at 1133-37; *see also* RICHARDS at 125-34. These measures, in turn, escalated awareness among religious Northerners about the evil of slavery and deepened their conviction that the "peculiar institution" posed a threat to the constitutional order. Unsurprisingly, then, denials of the right of free exercise and "the rights of conscience" were staples of the Republican indictment of the South both before and after the war. *Cf. Blylew v. United States*, 80 U.S. 581, 597 (1872) (noting that 1866 Act was passed to prohibit "those state laws which forbade a free colored person from . .. . pass[ing] through the state, from having firearms, or from exercising the functions of a minister of the gospel").

2. *Katzenbach v. Morgan* Was Rightly Decided

Petitioner has further invited the Court to renounce "in part" *Katzenbach v. Morgan*, insofar as that decision acknowledged independent congressional power to identify situations in which Fourteenth Amendment principles are threatened. Once again, it is not clear that Petitioner would benefit from any redescription of the outer limits of the

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power only to "prohibit[] free exercise." Thus, while a law "enforcing" the Establishment Clause might arguably face difficulties, *see Morgan*, 383 U.S. at 654 n.10, a law "enforcing" the Free Exercise Clause encounters no similar First Amendment problem.

Fourteenth Amendment enforcement power. As is explained above, RFRA is fully sustainable as an exercise of Congress's "remedial" authority: the Act is addressed to situations where "violations" -- of the Free Exercise Clause, of Equal Protection, and of various "hybrid" rights -- surely do "lurk[]," *EEOC v. Wyoming*, 460 U.S. at 260 (Burger, C.J., dissenting). By lightening evidentiary burdens and supplying an "up front" guarantee of uniform treatment of religious claims, RFRA serves to root out and correct unconstitutional practices that would otherwise go undetected; and, by requiring government officials to consider effects on religion carefully before taking action (and to justify actions already taken), the Act prevents unconstitutional conduct from occurring in the first place.[11]

But even were RFRA's "remedial" credentials less impeccable, Petitioner has given no good reason for throwing over the 30-year-old *Katzenbach* decision (which commanded a 7-2 majority) -- let alone the "special justification" that principles of *stare decisis* demand. In fact, and as intervening opinions of this Court have affirmed, *Morgan* gave an account of Congress's power to enact "appropriate" legislation under the Reconstruction Amendments that is faithful to the text and structure of the Constitution and to the intentions of the Amendments' framers — and one that has played a constructive part in the development of modern civil rights law, as well, *see infra*.

In fine, Petitioner (implicitly) and *Amicus* (explicitly) ask this Court for more intensive judicial scrutiny of the

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[11]The characterization of *Morgan* as recognizing a "substantive" constitutional power in Congress has itself been justly criticized as a "red herring," *see* Robin-Vergeer, That decision no more recognizes a wide-ranging power in Congress to pronounce literacy requirements "unconstitutional" than *McCulloch v. Maryland* acknowledges a "substantive" power to charter corporations or *United States v. Darby*, 312 U.S. 100, 115-17 (1941) a congressional power to "interpret" the constitutional term "Commerce . . . among the several States."

relationship between congressional enactment and constitutional power under the Reconstruction Amendments than under Article I; the standard laid down in *McCulloch*, it is suggested, allows Congress too much discretion to determine the "appropriate[ness]" of measures for enforcing the Reconstruction guarantees. This argument runs up against formidable difficulties: to begin with, the text of the Constitution strongly suggests that the "Necessary and Proper" Clause applies -- not by analogy, but directly and by its own force -- to the powers conferred by the Reconstruction Amendments. *See* U.S. CONST. art. I, § 8, cl. 18 (Clause applies to "the foregoing powers and *all other* powers vested in the government of the United States"); *cf. United States v. Rhodes*, 27 F. Cas. 785, 789 (C.C.D. Ky. 1867) (No. 16,151) (Swayne, J.) (Necessary and Proper Clause confers power to enforce 13th Amendment).

But even were that not so, and even if the equation of review for "appropriate[ness]" standard with scrutiny under the Necessary and Proper Clause did not date back more than a century, *see Ex Parte Virginia*, the indictment of *Morgan* would ring hollow. At the very least, the suggestion that Congress enjoys less discretion in exercising its Fourteenth Amendment power than it does exercising powers conferred on it by Article I stands in tension with repeated statements, in a variety of settings, that congressional power was "enlarged" by the Reconstruction Amendments, *see, e.g., Bitzer*, 427 U.S. at 456; *EEOC v. Wyoming*, 460 U.S. at 240; *Gregory v. Ashcroft*, 501 U.S. 452 (1991), and there can be little disagreement that the Framers of the original Constitution were more distrustful of congressional power than were the authors of the Fourteenth Amendment.

Nor, for that matter, is it immediately apparent how the interests of candor and political accountability that have been featured with increasing prominence in recent decisions, *see New York v. United States*, 508 U.S. at 156; *United States v. Lopez*, 115 S. Ct. 1624 (1995), would be

served by creating still greater incentives for Congress to cast antidiscrimination legislation as responsive to "substantial effects" on interstate commerce, *see Katzenbach v. McClung*, 379 U.S. 294 (1964) (upholding prohibition on discrimination in public accommodations, on the ground that restaurant purchased a significant fraction of its food from interstate vendors).[12]

These contentions become less convincing still when the legislative history of the Fourteenth Amendment is closely examined. The original draft of the Fourteenth Amendment consisted solely of a grant of legislative authority to Congress to enact

> all laws which shall be necessary and proper to secure the citizens of each State all privileges and immunities of citizens in the several States and to all persons in the Several States equal protection in the rights of life, liberty, and property.

see Cong. Globe, 39th Cong., 1st Sess. 1034 (1866), and although that proposal came to be replaced by a version, also drafted by Representative John Bingham, containing the explicit constraints on State power of Section 1 *and* the enlargement of congressional power of Section 5, the debt

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[12]Although this Court's opinions sometimes express the concern that a broad interpretation of Congress's "individual rights" power will supplant traditional state prerogatives in tort or criminal law, such dangers are scarcely absent under the Commerce power, *see, e.g., Cipolone v. Ligett Group, Inc.*, 505 U.S. 504 (1992) (holding certain state common-law causes of action preempted); *United States v. Lopez* (criminal law). Thus, while Petitioner thunders against the possibility that the Enforcement Power would sustain an "Ultimate Speech Act," Br. at 27 n.8, intended to facilitate nationwide distribution of hard-core pornography, a Congress bent on enacting such a law would have no trouble doing so on even the most restrained current understanding of the Commerce Clause. *See generally* Richard E. Levy, *An Unwelcome Stranger: Congressional Individual Rights Power and Federalism*, 44 KAN. L. REV. 61 (1995).

to *McCulloch* remained plain. *See* 17 U.S. (4 Wheat.) at 421 ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate . . . are constitutional."); *cf. The Civil Rights Cases*, 109 U.S. at 20 (§2 of 13th Amendment "clothes Congress with power to pass all laws necessary and proper for abolishing the badges and incidents of slavery"); *id.* at 51 (Harlan, J., dissenting) ("[t]he word 'appropriate' was undoubtedly used with reference to its meaning, as established by repeated decisions of this court") (citing *McCulloch*).[13]

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[13]Petitioner's Amicus, the Clarendon Foundation, repeats the allegation that the original Bingham proposal was consigned to "the sleep that knows no waking," Br. for Amicus at 5 (quoting Cong. Globe, 42d Cong., 1 Sess. app. 115) (1871)), *i.e.*, that it was "rejected", Br. at 6-12, as conferring too much power on Congress. Although real concern was expressed about leaving protection of civil rights *solely* in the hands of future legislative majorities (which, presumably, would eventually include unreconstructed Southern Democrats), *see, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 1095 (1866) (Rep. Hotchkiss), the suggestion that the Amendment's final form marked a retreat for congressional power has been contradicted by modern scholarship, *see* Michael P. Zuckert, *Congressional Power under the Fourteenth Amendment: The Original Understanding of Section 5*, 3 CONST. COMM. 123, 129-34 (1986) (explaining that Bingham's proposal was never rejected on the merits and that "[t]he more plausible interpretation is that the Democrats did not see postponement as equivalent to rejection at all, but as just that -- the postponement, but continued life, of a piece of legislation they opposed"). *Cf.* Richard L. Aynes, *On Misreading John Bingham and the Fourteenth Amendment*, 103 YALE L. J. 57 (1993)

As for the main thrust of the Clarendon Foundation Brief, depicting the *Morgan* power as the equivalent of the straw man attacked by Representative Bingham's opponents, *i.e.* congressional license to enact a "'code of municipal laws for the regulation of private rights,'" Br. at 16 (quoting *Civil Rights Cases*, 109 U.S. at 11), neither the statute upheld in *Morgan* nor RFRA, creates any "private rights." In fact, both create "modes of redress against the operation of state laws," Br. at 16. If RFRA sought to assure that no local landmark law would unduly burden religious free exercise by *enacting*

But as large as the *McCulloch* opinion loomed, this Court repeatedly has recognized an even more important influence on the 39th Congress's conception of enforcement power: Justice Story's opinion in *Prigg v. Pennsylvania*, 41 U.S. 539 (1842), upholding the constitutionality of the 1793 Fugitive Slave Act. *See. e.g., Patsy v. Florida Bd. Of Regents*, 457 U.S. 496, 504 (1983); *Monell v. New York City Dept. Of Social Services*, 436 U.S. 658, 672 (1978). As its abolitionist critics were keenly aware, *Prigg* took a very broad view of Congress's power to enforce the Constitution's Fugitive Slave Clause, *see* art. IV, § 2, cl. 3, even in the absence of an explicit grant of enforcement power, and upheld a private cause of action for damages against private defendants, in the face of a textual "state action" limitation, *see id.* ("No Person held to Service . . . in one State, under the Laws thereof, escaping into another, shall in *Consequence of any Law or Regulation* therein, be discharged from such Service") (emphasis supplied). Proponents of the Fourteenth Amendment cited *Prigg* as both the model and the measure of congressional enforcement power. *See* 41 U.S. at 612 ("If, indeed, the Constitution guarantees the right . . . the natural inference is that the national government is clothed with the appropriate authority and functions to enforce it"). Thus,

> Surely we have the authority to enact a law as efficient in the interest of freedom, now that freedom prevails throughout the country, as we had in the

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a national landmark law (rather than a law protecting religious freedom), *then* the danger warned against by Bingham's critics -- equality through uniformity and complete displacement of the States -- would have come to pass.

When the Clarendon Amicus Brief denies Congress the power to "proscribe[] . . . state actions that the federal judiciary has declared are fully consistent with the provisions of the Constitution," Br. at 21, Amicus has parted company not only with the author of the opinion of the Court in *Morgan*, but with the dissenter as well, *see Oregon v. Mitchell*, 400 U.S. at 215-17 (Harlan, J., concurring in part) (Congress may suspend literacy test nationwide).

> interest of slavery when it prevailed in a portion of the country.

Cong. Globe, 39th Cong., 1st Sess. 475 (1866) (Sen. Trumbull) (1866 Act); *accord Civil Rights Cases*, 109 U.S. at 53 (Harlan, J., dissenting); *see* Robert J. Kaczorowski, *The Enforcement Provisions of the Civil Rights Act of 1866: A Legislative History in Light of* Runyon v. McCrary, 98 YALE L. J. 565, 574 (1989); *see also id.* at 588 (explaining that certain enforcement provisions in 1866 Act were borrowed directly from 1850 Fugitive Slave Act).

The Framers of the Reconstruction Amendments, moreover, were especially hostile to the notion that delegated powers must be strictly construed -- a philosophy directly bound up in their minds with the legal theories of State Sovereignty which had emboldened the Southern Secessionists, *see* RICHARDS at 28-42. Their faith that the judiciary could be relied upon to give full effect to the protections of the Amendments was also short of complete.

There is still more direct evidence that the Framers took a broad, even a "substantive" view of their power under the Fourteenth Amendment. The same Congress that reported out the Fourteenth Amendment had enacted the 1866 Civil Rights Act (over a presidential veto), as an exercise of the "enforce[ment] by appropriate legislation" power conferred by Section 2 of the *Thirteenth* Amendment. If abolition of slavery and involuntary servitude could be "enforced" by requiring equal rights to make and enforce contracts, purchase property, or testify in court, it verges on inconceivable that the 39th Congress would have used identical "enforcement" language to express a narrow concept of congressional power under the Fourteenth Amendment. Although this exceptionally broad interpretation of the (13th Amendment) "enforcement" power was not free of all contemporaneous constitutional

doubt,[14] it was upheld in a series of federal court decisions and was enthusiastically embraced by the United States Executive Branch. *See generally Revolutionary Constitutionalism* at 900-22. Indeed, even the opinion for the majority in *The Slaughter-House Cases*, 83 U.S. 36 (1873), while taking a highly restrictive view of the list of "Privileges and Immunities" of National citizenship, took an expansive view of congressional enforcement power. To recognize a broad catalogue of National "Privileges," the Court explained, 83 U.S. at 77-78, would mean not only that

> these rights [would be] subject to control by Congress whenever in its discretion any of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the State in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects.

Indeed, the proposition that congressional power under the Thirteenth Amendment comprehends the (substantive) power not merely to prevent slavery but "rationally to determine" its "badges and incidents" and "to translate that determination into effective legislation" has not been a subject of controversy in modern era civil rights decisions. *Jones v. Alfred H. Mayer Co.*, 392 U.S. at 440; *see id.* at 449 (Harlan, J., dissenting) (arguing, as a matter of statutory interpretation, that Act does not reach private discrimination); *City of Memphis v. Greene*, 451 U.S. 100, 125 (1981) ("'the Enabling Clause of that Amendment empowered Congress to do much more'" than "abolish[] slavery and establish[] universal freedom")(quoting *Jones*, 392 U.S. at 439); *Griffin v. Breckenridge*, 403 U.S. at 105; *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971); *cf. City of*

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[14]Representative Bingham was prominent in believing that the Thirteenth Amendment did not supply the power, but his has been shown likely to have been a minority view, *see Revolutionary Constitutionalism* at 910-11.

Rome, 446 U.S. at 207 n.1 (Rehnquist, J., dissenting) (noting that powers under the Reconstruction Amendments "have always been treated as coextensive").

It has finally been suggested that the aspect of *Morgan* that is uniquely troubling is its recognition of a "ratchet," whereby Congress' alleged "substantive" powers of constitutional interpretation, *see supra*, allow it to expand upon, but not contract, those protections of the Fourteenth Amendment established by judicial decision. This allegation is misleading in at least four respects. First, Congress' complete lack of power to contract Equal Protection rights, *see Mississippi University for Women v. Hogan* 458 U.S. 718, 732 (1982), is a consequence not of *Morgan*, but of *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803), and applies with no greater force when Congress acts under authority conferred by the Reconstruction Amendments than under any other source of power, *see, e.g., Metropolitan Life Ins. v. Ward,* 470 U.S. at 880-82 (1985) (congressional exemption of State laws from negative Commerce Clause scrutiny cannot immunize them against Equal Protection attack).

Second, as discussed above, the "ratchet's" "upward" dimension is itself the result of a semantic ploy, whereby Congress' election of appropriate means to enforce the Fourteenth Amendment is described as a choice of *ends* (thus an "interpretation" of the Constitution), while any other exercises of discretion are described in purely *instrumental* terms, *see, e.g., McCulloch*. But enacting an "appropriate" civil rights statute has no more of a "ratchet" effect than chartering a bank, and a rights statute no more "re-interprets" the Equal Protection guarantee than a law reaching in-state manufacturing "re-interprets" the meaning of "interstate commerce." At all events, the "ratchet" *does not operate* in one direction, as a matter of theory or fact: Congress always retains power to repeal the statute it enacted, thereby "contracting" rights in precisely the degree it once "expanded" them, and Congress has -- effectively unreviewable -- discretion not to wield its powers in the first

place (based on a "substantive" understanding of the Constitution -- or on no reason at all).

This last point is of special significance in this case, especially in deciding the proper weight to give *stare decisis* concerns. The long lull in decisions of this Court interpreting congressional authority under the Reconstruction Amendments was not the result of random chance but rather reflects a stark historical fact: that, for the better part of a century, Congress studiously neglected all responsibility for enforcing the basic rights guarantees of the Thirteenth, Fourteenth, and Fifteenth Amendments. This inaction was hardly reflective of a good-faith judgment that the States were, in fact, supplying "Equal Protection of the Laws," that the Right to Vote was not being abridged on account of Race or Color, or that the "badges and incidents" of the historic system of racial caste had been wiped away. It was attributable, rather, to "extraordinary defects in the national political proess," *South Carolina v. Baker*, 485 U.S. 505, 512 (1988), including, but not limited to the wholesale disenfranchisement of those whose rights were being most egregiously denied. This Court's response was boldly to move against racial injustice, in the name of constitutional principle, *see, e.g.*, *Shelley v. Kraemer*, 334 U.S. 1 (1948); *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Cooper v. Aaron*, at considerable risk to the Court's power and prestige, *see also* JACK BASS, UNLIKELY HEROES (1981).

The decision in *Morgan* arose at a very different time, when the defects that had long plagued the national political process were beginning to be overcome, *see* ROBERT MANN, THE WALLS OF JERICHO (1996) (discussing passage of Civil Rights Act of 1964), and when Congress had taken up in earnest its responsibilities of enforcing the Constitution's civil rights protections. *See generally United States v. Price*, 383 U.S. at 806 (noting that, even 15 years earlier, "the federal role in the establishment and vindication of fundamental rights . . . was neither as pervasive nor as intense as it is today").

Morgan and other decisions upholding civil rights laws, *see, e.g., South Carolina v. Katzenbach,* recognized this to be a wholly salutary development: that Congress, as a politically accountable branch (and one not bound by *stare decisis*), as the one best suited for dealing with complex, interdependent claims, and most capable of framing broad remedial and prophylactic rules, was by far the better institution to consider assertions of new "rights" and to devise new and better modes for enforcing existing ones. This cooperative arrangement, explicit in certain decisions of the Court and implicit in others, is entirely "in accordance with [the] historical design," *Price*, 383 U.S. at 806, of the Reconstruction Amendments and has proved highly beneficial: the Court has been allowed to adhere to principles of judicial restraint, while Congress has developed substantial expertise in the problems of discrimination and civil rights remedies.

This understanding, that Congress may "lead" the Court, that it is authorized to make judgments that, while consistent with constitutional guarantees, are not strictly required by them, has been relied upon by both branches, *see Pennsylvania v. Union Gas*, 491 U.S. 1, 35 (1989) (Scalia, J, concurring in part and dissenting in part) (noting judicial and congressional reliance on 11th Amendment case law), and especially so with regard to legislation securing basic rights for individuals whose exclusion from full and equal participation in the mainstream has been most long and unjust. *See* Americans with Disabilities Act, 42 U.S.C. § 12101; Age Discrimination in Employment Act, 29 U.S.C. § 621; Voting Rights Act, 42 U.S.C. § 1973(b); Civil Rights Act of 1991, Pub. L. 102-166. Neither text, precedent, nor principle supports disturbing this settled understanding or casting doubt on the validity of such laws. *Cf. Bush v. Vera*, 116 S. Ct. 1941, 1968-69 (1996) (O'Connor, J., concurring).

Conclusion

For the foregoing reasons, *Amicus* suggests that the judgment below should be affirmed.

Respectfully submitted,

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